

May 22, 2014

Mr. Ryan Wulff  
National Marine Fisheries Service  
650 Capitol Mall, Suite 5-100  
Sacramento, CA 95814

**Re: Draft Bay Delta Conservation Plan and associated Draft Environmental Impact Report/Environmental Impact Statement**

Dear Mr. Wulff:

The Delta Protection Commission (Commission) is a California State agency created by 1992 legislation that declared “the Delta is a natural resource of statewide, national, and international significance, containing irreplaceable resources, and that it is the policy of the state to recognize, preserve and protect those resources of the Delta for the use and enjoyment of current and future generations” (California Public Resources Code (PRC) section 29701).

The Delta Reform Act of 2009 (Chapter 5, California Statutes of 2009-10 Seventh Extraordinary Session) declared that the basic goals for the Delta are to provide a more reliable water supply for California and protect, restore and enhance the Delta ecosystem, “in a manner that protects and enhances the unique cultural, recreational, natural resource and agricultural values of the Delta as an evolving place” (PRC section 29702). Further, the Commission is identified as a “forum for Delta residents to engage in decisions regarding actions to recognize and enhance the unique cultural, recreational, and agricultural resources of the Delta” (PRC section 29703.5(a)). In addition, the Commission has been identified to lead and support a variety of recommendations in the Delta Stewardship Council’s Delta Plan, many related to protecting and enhancing the Delta’s unique values.

Another primary Commission responsibility is to prepare and implement a comprehensive long-term Land Use and Resource Management Plan (LURMP) for the primary zone of the Delta. General plans of the five Delta counties are required to be consistent with the LURMP. PRC Section 29760(b) sets out policy requirements for the LURMP, which include the following:

- Protect and preserve the cultural values and economic vitality that reflect the history, natural heritage, and human resources of the delta.
- Conserve and protect the quality of renewable resources.
- Preserve and protect agricultural viability.
- Restore, improve, and manage levee systems.
- Preserve and protect water quality of the Delta.
- Preserve and protect open-space and outdoor recreational opportunities.

- Protect the Delta from any development that results in any significant loss of habitat or agricultural land.

The Commission has determined it is appropriate to review the proposed Bay Delta Conservation Plan (BDCP, or “project”) and the associated Draft Environmental Impact Report/Environmental Impact Statement (DEIR/EIS) in relation to the LURMP. LURMP policies have been adopted to protect and enhance the Delta’s unique resources. To the extent that any project contradicts those policies, whether or not officially under the jurisdiction of the Commission, it is likely that the project will harm or reduce the unique values of the Delta.

It is worth stating at the outset that the BDCP and its associated DEIR/EIS represent an immensely complicated project and analysis, and it is challenging to navigate the entirety of the proposal to determine its impacts on the unique cultural, recreational, natural resource and agricultural values of the Delta. The project review period also occurs during a time when drought-related activities are competing for time and attention with the review of this proposal. Important components of the BDCP (especially the anticipated Implementation Agreement) also have still not been released. This creates an additional challenge for interested parties to review the full context of the proposal.

As such, our review of the project has attempted to be thorough with regard to the most significant impacts to the Delta region, even though it is not comprehensive. The Commission’s comments are organized into three primary areas of concern, as follows:

#### **A. INADEQUATE CHARACTERIZATION OF IMPACTS TO DELTA AS PLACE**

While we appreciate the effort and consideration that went into the proposed BDCP, our primary criticism of the effort is that it was completed with an overwhelming focus on one of the co-equal goals (a more reliable water supply for California; more specifically, in our view, a more reliable water supply for south-of-Delta exporters) and a distant secondary focus on the other co-equal goal (protect, restore and enhance the Delta ecosystem). This almost entirely disregards the essential context provided in law -- protection and enhancement of the unique cultural, recreational, natural resource and agricultural values of the Delta as an evolving place.

**Community Impacts:** The BDCP estimates numerous impacts to Delta residents and visitors from construction activities, including exposure to construction noise at all hours, truck traffic leading to unacceptable level-of-service and pavement conditions, impacts to local farm and resident traffic from road relocations, new sources of light/glare that will adversely affect views in the area, effects on regional/local utilities, increase in safety hazards, and visual impacts to communities near intake and tunnel construction. The attached matrix outlines some of the specific concerns related to these issues.

As the BDCP states, the visual character of the Delta is strongly identified by its agricultural and water-based Delta landscapes and communities. As stated in DEIR/EIS Chapter 17 (page 205, lines 2-7): “These conservation measures would alter the Delta landscape by incrementally, and substantially, introducing elements into the study area over time. This could pave the way for the gradual transition of a much-valued cultural and regional landscape and make it easier for other similar projects to be implemented over time because of the devalued baseline conditions, compared to Existing Conditions, if conservation measures are not planned and implemented in a manner that protects visual resources.”

To attempt to better depict the actual impacts of some of the construction activities of the BDCP, the Commission undertook an effort to develop visual simulations of construction activities at some construction locations, based on information available in the BDCP. These materials have been shared with the project proponent.

**Recreation Impacts:** The BDCP undercounts recreational spending in the Delta by \$76 million, as compared with the recreational spending estimated in the Commission’s Economic Sustainability Plan (\$236 million in DEIR/EIS, \$312 million in the Economic Sustainability Plan). There also will be reduced boating opportunities in the vicinity of riverside construction and barge traffic, with resulting significant economic impacts to marinas from reduced boat traffic. Over a construction period lasting up to 10 years, it is likely that some number of these marinas will be unable to survive these negative impacts to their businesses.

There also will be a reduction in Delta day visitors due to road relocation and avoidance of truck traffic, and resulting impacts on the Delta economy. Finally, there will be a negative impact on Delta park facilities from tunnel construction and other conservation measures.

**Agriculture Impacts:** Conversion of agricultural land for habitat restoration, especially tidal marsh restoration, is significant and dwarfs the conversion of agricultural land for tunnel construction activities. Combined, approximately 14% (70,000 acres) of Delta farmland is proposed for outright conversion to tidal marsh or tunnel construction, while an additional more than 10,000 acres would be agriculturally-restricted through seasonal flooding or other proposed restoration activities. To minimize the impact on the Delta economy and communities, restoration efforts should focus first on existing publicly-owned land or land owned by conservation entities intended for restoration activities before acquiring productive agricultural land for restoration.

In addition to these direct conversions of agricultural land, there also are significant indirect negative impacts on Delta agricultural land. These include changes to groundwater levels (both increase and decrease) occurring as a result of tunnel construction and restoration activities on adjoining lands, and the corresponding impact on the root zones of crops; and disruption of drainage and irrigation facilities from tunnel construction.

It also is worth noting that the Commission has a role in reviewing any land-use changes on Staten Island, the proposed site of tunnel construction areas and tunnel material placement. Staten Island is subject to a 2001 conservation easement and a 2002 Memorandum of Understanding between the Commission and the Department of Water Resources (DWR). The stated intent of the conservation easement is that Staten Island be protected from “any actions that would result in the conversion of any material portion... away from agricultural use.” DWR is the holder of the conservation easement and legally responsible for its enforcement. To date, the Commission has not been consulted related to these obligations, nor has it received a restoration plan for review as required by the conservation easement. It is difficult to understand how DWR intends to comply with these requirements and manage the apparent conflict of interest between its legal obligations to protect Staten Island against conversions from agricultural use and its interest in advancing the BDCP.

The primary mitigation measure for agricultural impacts is the proposed Agricultural Lands Stewardship Plan (ALSP – Mitigation Measure AG-1). While the recent draft version of the ALSP includes a variety of useful and well-thought mitigation strategies that would benefit agriculture, it also includes measures that appear designed more to facilitate restoration of agricultural land for the benefit of listed species. The Commission recommends that the Delta agricultural community be invited to select a preferred administrator for the agricultural mitigation funding, and allow this administrator to work with the full range of ALSP strategies to determine the best measures to mitigate for the loss of Delta farmland.

**Water Impacts:** The BDCP has significant effects on Delta water quantity and quality, but water supply to the Delta was not analyzed. The BDCP analysis shows a change in Delta water elevations, but does not analyze the impacts of this change on Delta agricultural water diversions, recreational fishing and boating. Agricultural water quantity is also mentioned as a significant and unavoidable impact. The DEIR/EIS acknowledges that water losses related to construction dewatering may not be replaced with supplies sufficient to meet the preexisting demands or planned demands of the affected party. In addition, the feasibility and effectiveness of phased actions to reduce salinity levels is uncertain.

Also, water quality impacts to Delta water supplies include both an increase in dissolved organic carbon (affecting municipal supplies pumped from the Delta) and salinity (affecting both agriculture and municipal supplies). These impacts are listed as significant and unavoidable, and the only mitigation suggested is a vague description of assistance that “may take the form of financial contributions, technical contributions or partnerships.”

## **B. INADEQUATE ANALYSIS OF ALTERNATIVES**

The DEIR/EIS fails to include appropriate alternatives for analysis. All but one of the DEIR/EIS alternatives are variations of the preferred alternative. This narrow list of alternatives even

ignores recommendations from DWR's own January 2008 "Risks and Options to Reduce Risks to Fishery and Water Supply Uses of the Sacramento/San Joaquin Delta" report, which identifies three scenarios with highest risk reduction potential, two of which are ignored in BDCP: Armored Pathway Through-Delta Conveyance and Seismically Improved Levees. The Commission's 2012 Economic Sustainability Plan describes additional alternatives to ensure water supply reliability that were not considered.

Informing this focus on narrow alternatives, BDCP's characterization of the condition of Delta levees (Appendix 3E) is at odds with the description of Delta levees included in the Commission's Economic Sustainability Plan. Specifically, BDCP builds a case for an isolated conveyance facility based on the fragility of Delta levees, without adequate consideration to significant Delta levee improvements made over the past several decades through the Delta Levees Subvention Program.

### **C. INADEQUATE MECHANISMS FOR ADDRESSING PROJECT IMPACTS**

The Commission is concerned about the composition of the Stakeholder Council identified as the governance entity for the project. and supports Delta involvement to ensure that the project is operated in a way that takes into account Delta concerns.

In addition, a variation of the adaptive management contemplated for habitat restoration can and should be applied to socio-economic impacts to the Delta region. The project proponent should be responsible for monitoring project impacts and studying community impacts and regional economic impacts of the project to ensure that project actions are appropriately mitigated. For community and regional impacts, the project proponent could utilize the existing Delta Investment Fund established in the Delta Reform Act of 2009 (PRC section 29778.5) to advance regional economic sustainability and enhance Delta communities.

For individuals directly impacted by BDCP construction, there should be a simpler claims process to address economic damages related to tunnel construction activity. A mitigation measure should be added to establish a "Delta Compensation Fund" funded by the project proponent and administered by an impartial and independent third party. Modeled after the British Petroleum Deepwater Horizon Disaster Victim Compensation Fund and with funding sufficient to address deleterious impacts created by completion of the BDCP Conservation Measures (especially the construction of the tunnels) placed into an escrow account, the administrator of the Delta Compensation Fund would make payments directly to affected parties. This would both provide an impartial means of addressing negative impacts and a prompt method to compensate those affected.

These impacts and possible modifications are further described in the attached matrix. We ask that the comments contained in both this letter and the attached matrix be considered as our

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comments on the BDCP and associated environmental documents. From the Commission's perspective, the biggest positive change that BDCP could make to improve the unique cultural, recreational, natural resource and agricultural values of the Delta would be to consider alternatives to the proposed 9000 cfs isolated conveyance facility and reduce the scale of the habitat restoration.

Again, we urge that thorough analysis be conducted on all alternatives that would achieve the co-equal goals while accomplishing the objective inherent in achieving them – to protect and enhance the unique cultural, recreational, natural resource and agricultural values of the Sacramento-San Joaquin Delta.

Sincerely,

Erik Vink  
Executive Director